April 18, 2012

Dr. David Michaels, Phd, MPH
Assistant Secretary
U.S. Dept. of Labor
Occupational Safety and Health Administration
200 Constitution Avenue N.W.
Room S2315
Washington, D.C. 20210

Re: *Employer Safety Incentive and Disincentive Policies and Practices Memorandum March 12, 2012*

Summary: *The object of the OSH Act is to assure that employers provide workers with safe premises where they work; the result of the March 12, 2012 memo is to strip employers of legitimate tools by which they can effectively manage their company's safety performance. This memo deems the provision of incentives for safety performance to be discriminatory. We challenge this thinking. The memo also deems the employers issuance of discipline to an employee for failing to report an injury or illness in a timely manner as discrimination and or retaliation. We are puzzled as to how OSHA can hold the employer taking the actions needed to ensure employee compliance as stated in 5(b) of the OSH Act of 1970 as discriminatory. OSHA should stand behind the efforts of all employers to assure that the reporting of occupational illnesses and injuries is accomplished on a timely basis. This memorandum usurps the employer's authority to assure timely reporting, while the employer is held to performance standards for his firms reporting. We propose meeting on Tuesday, May 22, 2012 at 2:00 P.M. to discuss this with you and your team.*

Dear Dr. Michaels:
We are writing to request that OSHA withdraw the above captioned guidance memorandum which instructs OSHA personnel that employers exercising their choice of tools to meet their obligations to provide a safe workplace under the General Duty clause somehow rises to the level of discrimination.

PMPA and its member companies accept that they have the duty under OSH Act of 1970 to provide a safe place of work:

> *(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;* — *29 USC 654*
>
> *(2) shall comply with occupational safety and health standards promulgated under this Act.*

We also recognize that our employees have a ***duty*** to comply with occupational safety rules, regulations and orders:

> *(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.*

PMPA and its member companies further recognize that implicit in this duty is a recognition that our companies and their management have both the ***responsibility*** and ***authority*** to take *such actions as are deemed necessary to ensure the provision of a safe workplace.*

While nothing in the March 12, 2012 memorandum relieves employers of their duty under Section 5 of the OSH Act of 1970, the memorandum removes from employers the tools under their authority to assure compliance of employees to the employers' safety program. To hold employers accountable for safety performance, while preventing them from using tools which are longstanding and have been recognized as effective, flies in the face of logic as well as the intent of the OSH Act.

It is also a fallacy to paint these tools as somehow discriminatory; if the ability to discipline an employee for failing to timely report an injury is characterized as discrimination, then certainly OSHA's ability to discipline employers for failure to post an OSHA 300 report on time is similarly a discriminatory and unacceptable abuse of authority. ***There can be no true employer responsibility (duty) without the concomitant authority to take steps needed to assure compliance.***

Incentives issue.

We are challenged to understand how OSHA can find the use of effective incentives as somehow discriminatory. While we understand that federal agencies may not be incentivized to perform, the use of incentives and provision of bonuses for achievement of goals is well established broadly in American culture as well as in business. As a former plant manager, as a coach, and as a father, I have found the use of positive reinforcement techniques to be a powerful tool in helping my fellow employees, team, and family keep in mind and work toward shared goals. Offering incentives is not discriminatory.

Actions have consequences. Everyone knows this. It is fundamental to life, to work, and to discipline. Employers are held to be responsible for the consequences of their actions. Employees too, need to be held responsible and accountable for their actions. An incentive helps the employee stay aware of the goal being incentivized. Earning an incentive reinforces desired behaviors. Failing to earn an incentive increases awareness of the need to improve or change behavior. The fact that a consequence arises as a result of an employee action is neither discriminatory nor retaliation. It is the simple result of the employee's action or failure to act.

If a group incentive is "disqualified" by an event; that disqualification applies to all parties not to just one or two. This is not discriminatory. The offering of an incentive to elicit desired behaviors is a time tested and proven technique in business, society, and its effectiveness is well documented in the behavioral sciences. Why is OSHA preventing employers, who have the duty, responsibility and authority to maintain a safe workplace, from using proven behavioral techniques to manage their plants safely?

Late reporting of injuries

The PMPA and our member shops agree that reporting an injury is **an obligation** of the employees under section 5(b) of the OSH act of 1970. We do not see it as an employee right, it is clearly a responsibility of the employee to comply with safety health standards and all rules, regulations, and orders under 5(b):

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

We disagree that holding an employee to meet his responsibilities under 5(b) somehow becomes discrimination or retaliation under 11(c). 5(b) is clear- the employee has an obligation to comply; 5(a) is clear- an employer has a duty to assure a safe workplace. ***Without the authority to discipline to ensure employee compliance, the employer's responsibility to achieve 5(a) is impossible to ensure.***

For example, we agree that the employer must post a log of work related injuries and illnesses (1904.32(a)(1)); we are certain that OSHA would agree that the employer has the right to insist on the timely reporting of work related injuries and illnesses so that they can accurately complete and post that report. Certainly you would agree that if the employer is to be held accountable, the employer must have the authority to ensure that his employees are reporting injuries and illnesses to him on a timely basis, just as OSHA has the authority- and means- to ensure and enforce employer compliance.

It is meaningless for an employer to have rules regarding the timely reporting of injuries, if the employer is no longer able to enforce the timely reporting, because that enforcement is now somehow retaliatory or discriminatory. Holding that an employer issuing discipline for a rule violation is discriminatory relieves the employer of his obligation under 5(a). Without the means to be able to ensure compliance to the rules needed to make the workplace safer, the employer has no actual authority to meet his obligation. ***The March 12th memorandum strips the employer of his authority by making provision of incentives and employee discipline for rule violation discrimination and or retaliation.***

The object of the need to report injuries is clear: to assure that all hazards are recognized and reported so that they can be remediated. So that workplace safety data is captured and able to be used by the employer to improve the safety of the shop. The employer needs to be able to maintain discipline to assure compliance with rules, such as timely reporting of injuries in the workplace. Issuance of discipline to employees who fail to follow the employer's rules regarding timely reporting of injuries is a necessary component of an effective safety program. The March 12, 2012 memo makes this necessary component of a safety program now a possible violation of 11(c) whistleblowing discrimination and retaliation. It is not. ***Providing discipline to a rule violator is the natural result of a failure to follow a rule as required by OSHA Act 5(b).***

There are other issues with this memorandum. But the removal of the employer's authority to issue discipline for rule violations related to the tardy reporting of workplace injuries is anathema to the practice of industrial safety in our shops and needs to be removed immediately. Without the ability to enforce compliance with rules, employers will have no effective means to meet their obligations under 5(a).

The declaration by this memo that the use of incentives is discriminatory rather than recognizing them as enablers of improved safety performance in our shops is also a challenge to our rights as employers to use best means to meet our obligations under 5(a) to provide a safe workplace. Incentives have been proven to be effective means to empower workers to increase awareness and improve performance. We remain puzzled to see why such an outcome is now seen by OSHA as retaliatory or discriminatory.

We respectfully request that OSHA rescind the March 12, 2012 memo as it usurps employers' authority to manage their safety program by ruling certain effective tools to be unlawful, while still holding employers to the highest standards for employee conduct and workplace safety. Without authority, there can be no true responsibility. The March 12 memorandum holds employers responsible while reducing their authority to choose and use effective means to ensure the achievement of their responsibilities under 5(a) of the OSH act of 1970.

We have enclosed a guidance document that we prepared for our membership so that you can see how the March 12, 2012 memorandum has impacted our industry.

We propose meeting with you and your team on Tuesday, May 22, 2012 at 2:00 P.M. We will be in Washington D.C. on that day and would like to connect.

Thank you.

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